SIVAPACKIAM PONNIAH

v.

MARIMUTHU JAGANATHAN

HIGH COURT MALAYA, KUALA LUMPUR
GUNN CHIT TUAN J
[ORIGINATING SUMMONS NO. F 340/82]
1 APRIL 1985

CONTRACT: *Sale and purchase of property - Deposit paid - Forfeiture of deposit - Whether contract was null and void - Whether contract varied subsequently.*

The plaintiff owned a piece of land and the house on it. She sold this property to the defendant for a sum of RM110,000 in two agreements signed on 26 April 1980. The defendant paid RM16,500 to the plaintiff as deposit. The deposit was to be forfeited if the defendant failed to pay the balance of the purchase price by 26 October 1980.

Later, one Chandran took over the purchase from the defendant. The plaintiff orally agreed to extend the completion date by 6 months in consideration of some payments made by Chandran to her of part of the balance of the purchase price. The plaintiff transferred the property to Chandran on 22 September 1980.

After 26 October 1980, the original date of completion, the plaintiff forfeited the deposit and seeks to declare the contract and consequently the instrument of transfer of the property null and void pursuant to one of the terms of the contract. The plaintiff also seeks to retrieve the title deeds to the said property.

Held:

[1] On the balance of probabilities, the said memorandum of transfer was signed by the plaintiff and was taken in escrow when it was handed to Mr. Vijaya Kumar on 26 April 1980. It was only completed on 22 September 1980 after Chandran s/o Sintanasi had taken over the purchase of the said property from the defendant. Therefore, the said memorandum of transfer was not null and void.

[2] There was sufficient evidence to show that there had been variation of the said agreements. There was therefore no breach of the said agreements as alleged by the plaintiff.

[Summons dismissed with costs.]

Case referred to:
Hew Kee Yin [1962] 28 MLJ 249

For the plaintiff - Karpal Singh; M/s. Karpal Singh & Co.
For the defendant - Raja Aziz; M/s. Rithauddeen & Aziz

JUDGMENT

Gunn Chit Tuan J:

Madam Sivapackiam d/o Ponniah (hereinafter referred to as "the plaintiff") is the registered proprietor of a piece of land held under Geran Mukim 104 for Lot No. 8164 in the Mukim of Setapak, together with a dwelling house erected thereon known as DST No. 6, Taman Sri

Gombak, Kuala Lumpur. By two agreements both dated 26 April 1980 (pp. 1-5 of the agreed bundle of documents marked 'A') she agreed to sell the said land, dwelling house and fittings therein to Marimuthu a/1 Jaganathan (hereafter referred to as "the defendant") for the total purchase price of RM110,000. The defendant paid the plaintiff on or before 26 April 1980, a sum of RM16,500, which was acknowledged in the first of the said agreements, by way of deposit which was to be forfeited in the event the defendant failed to pay the balance of the purchase price amounting to RM93,500 on or before 26 October 1980.

The plaintiff alleged that she had executed a memorandum of transfer on 22 September 1980 (pp. 14 to 16 of 'A') but as the defendant had failed to pay the balance of the purchase price by 26 October 1980, she forfeited the said sum of RM16,500 as agreed liquidated damages and rescinded the said two agreements which became null and void. She therefore applied by way of originating summons on 30 April 1982, for the following orders:

(i) That the principal agreement and supplemental Agreements dated 26 April 1980, entered into between the applicant and the respondent in respect of land held under Geran Mukim 104 for Lot No. 8164 in the Mukim of Setapak be declared null and void pursuant to Clause 4 of the said principal Agreement.

(ii) A declaration that the instrument of transfer executed by the applicant in the terms of Form 14A of the National Land Code, 1965, on 22 September 1980 is void and that the said instrument be delivered up for cancellation and be cancelled.

(iii) That the respondent do deliver the title deeds for land held under Geran Mukim 104 for Lot No. 8164 in the Mukim of Setapak, to the applicant forthwith.

When Counsel for both parties appeared before Wan Hamzah J (as he then was) in Chambers on 18 May 1982, they applied for and obtained an order that the said originating summons be heard as an action in open Court so that witnesses could be examined. I therefore had the opportunity of seeing the plaintiff in the witness box and heard her give her evidence before me on 29 January 1985, when she told the Court in examination-in-chief that she did not agree to extend the completion date beyond 26 October 1980, on which date she had only been paid RM36,500. Under cross-examination she denied that she could speak English although I observed that she could on many occasions answer questions by both Counsel even before the Court Indian interpreter had translated the questions for her. When she was referred to her affidavit dated 27 April 1982, (encl. 1) she said that she did not affirm it in English although she understood the contents therein. Mr. K. Subramaniam (DW2) a commissioner of oaths in the High Court, Kuala Lumpur, before whom she had affirmed that affidavit explained later on that interpreters normally asked deponents whether they understood the contents of their affidavits. Even if they understood English the commissioner of oaths would still read the contents to them. Mr. Subramaniam, however, could not remember whether the plaintiff understood English but added that if a deponent understood Tamil only, they would explain the contents to him or to her and before signing the affidavit would make sure that the deponent understood the contents after they have been explained in Tamil. That defence witness also said that affidavits were normally prepared by lawyers and that if a deponent did not understand English the lawyer's office would type in the jurat. But it can be seen from the affidavits [encl. 1 and 17] affirmed by the plaintiff in this case that there are no jurat in either of them and this would tend to confirm the evidence of another defence witness, Mr. Vijaya Kumar s/o Chornalingam (DW3), an advocate & solicitor, who told the Court that the plaintiff spoke to him in English when she came to give him instructions in this matter together with the purchaser.

The plaintiff also stated that Mr. Vijaya Kumar s/o Chornalingam, who was then practising in James Foong & Co., advocates & solicitors, was the defendant's lawyer and that his firm was not then acting on behalf of both parties. She said that she did not have any lawyer which was clearly a lie in view of what Mr. Vijaya Kumar (DW3) told the Court later on that he had taken instructions in this matter from both parties. Another instance of a lie by the plaintiff was her statement that when she signed the said agreements no one read or explained the terms to her. She claimed that the agreements were prepared beforehand and that she was merely asked to sign them although she conceded that she did tell the lawyer in question that she agreed to the price of the house and asked for a deposit of RM16,500 to be paid to her. That statement of the plaintiff was in direct contradiction to the evidence of Mr. Vijaya Kumar (DW3) whom I believed, when he told the Court that he had, on the instructions of both parties, prepared the said agreements which were signed by them before him. The vendor, Madam Sivapackiam, that is the plaintiff, definitely understood the contents of the documents before she signed them and also acknowledged to him at the time she signed the said agreements that she had received RM16,500.

The plaintiff also admitted under cross-examination that when she went to the house of one Chandran s/o Sintanasi (DW5), who was nominated by the defendant to be the purchaser of the said land and house, she had made a demand for RM15,000. The date was 10 September 1980. After she was referred to a receipt dated 11 September 1980, signed by her (p. 9 of 'A') acknowledging receipt of RM15,000, she denied when challenged that she had received RM15,000 on that day, i.e. 11 September 1980. Then when she was referred to her letter dated 16 September 1980, addressed to M/s. James Foong & Co. (p. 10 of 'A') she admitted that she had signed it but added that all she remembered was that she went to the lawyer's office and was asked to sign three letters. The letters were prepared by the lawyer who did not explain the contents to her. That again was a lie and in direct contradiction to the evidence of Mr. Vijaya Kumar (DW3). By that letter of 16 September 1980, she agreed and authorised M/s. James Foong & Co. to forward her grant of title of her said property and the memorandum of transfer duly executed by her to M/s. Lovelace & Hastings, the solicitors of M/s. United Malayan Banking Corporation which had granted a loan of RM60,000 to Chandran s/o Sintanasi (DW5) to enable him to pay for the balance of the purchase price of her said property. Mr. Vijaya Kumar, who was not challenged by plaintiff's Counsel in cross-examination and whom I had no reason to disbelieve, told the Court that letter of 16 September 1980, was signed by the plaintiff in his presence. He had prepared the letter in his office and did explain the contents of the letter to her. In fact as a result of the plaintiff's letter of 16 September 1980, he later wrote a letter dated 17 September 1980, to M/s. Lovelace & Hastings (p. 12 of 'A') enclosing the plaintiff's title to her property on the expressed undertaking by M/s. Lovelace & Hastings to forward to them the loan sum of RM60,000 upon registration of the relevant charge on the said property.

However, the plaintiff did admit under cross-examination that Chandran (DW5) had requested six months for completion and that she had agreed to it. She stated that she was aware that the balance of the purchase price had to be paid by 26 October 1980, but also admitted that there was an oral agreement between Chandran (DW5) and her that the former would pay her some money before she went to India on 2 October 1980. She agreed with defence Counsel that the agreements for the purchase of her property was therefore varied orally whereby she was paid some money before the completion date. She also admitted that she did not come back from India until 17 November 1980, and was not here in this country on 26 October 1980.

During re-examination by her own Counsel, Mr. Karpal Singh, the plaintiff confirmed once again that there was an oral agreement with Chandran (DW5). She was, however, very evasive at that stage in answering her own Counsel's questions about how the said agreements were varied and then changed her mind and said that there was a written agreement. She claimed that the receipt signed by her on 11 September 1980 (p. 9 of 'A') was the written agreement but contended that it was only the agreement relating to the sale of the fittings which was varied. But she was then unable to explain to the Court why the receipt shown on p. 9 of 'A' refers to her said property and not to the fittings therein. Having seen and heard the plaintiff give her evidence from the witness box for more than two days, I found that she was a person who did not hesitate to be mendacious and therefore did not find her to be a witness of truth.

The defendant (DW4), who was a contractor and who did not appear to be literate in English, told the Court that when he and the plaintiff signed the said agreements he had already paid the latter RM16,500 partly by cheques and partly by cash. The payments were made about one week before they signed the said agreements. He also confirmed that he had paid the various sums amounting to RM18,500 which are referred to in the three receipts shown on pp. 6, 7 and 11 of the agreed bundle of documents marked 'A'. He told the Court that the receipt of the plaintiff shown on p. 9 'A' was signed by the plaintiff in the presence of Chandran (DW5) whom he subsequently nominated for the purchase of the plaintiff's property. The sum of RM15,000 referred to in that receipt was paid on 11 September 1980, partly in cheques and partly in cash amounting to RM7,000. He also confirmed that he was present when the plaintiff signed her letter dated 16 September 1980 (p. 10 of 'A') in front of the lawyer Mr. Vijaya Kumar (DW3) who had prepared that letter on their instructions. He told the Court that he had made some more payments before the completion date because the plaintiff had insisted on payment and they therefore agreed on the arrangement referred to in her letter on p. 10 of 'A' after Chandran had applied for a bank loan. He also corroborated the evidence of Mr. Vijaya Kumar that the plaintiff had spoken to the latter in English and that instructions were given to him by both of them regarding the said agreements. Under cross-examination the defendant explained that he had nominated Chandran to be the purchaser at a later stage because he was unable to buy the house "after having paid three-quarters of the purchase money." He agreed with plaintiff's Counsel that when he signed the said agreements he did not intend to nominate Chandran but as far as he could remember the memorandum of transfer was signed by the plaintiff in accordance with the terms of the first agreement and that it was not true that she had signed the transfer on 22 September 1980.

When Mr. Vijaya Kumar (DW3) was asked about the memorandum of transfer by Y.M. Raja Aziz, the defence Counsel, he said that it was handed to him when the said agreements themselves were executed. At that time the purchaser had not nominated Chandran and it was after the defendant had nominated Chandran that the transfer form was completed on 22 September 1980. The names of the parties had not been entered because the document was taken in escrow. Under cross-examination Mr. Vijaya Kumar agreed that on 22 September 1980, the balance had not been paid. He said that he was told by both parties on that date that RM50,000 had been paid. During the re-examination he explained that the transfer had to be executed prior to payment because it had to be sent for adjudication and stamping first. Moreover, the property has to be transferred to the purchaser before it could be charged to the bank for a loan. He explained that it was normal practice and that the consideration stated in the memorandum was that stated in the first agreement.

The last witness for the defence whom I believed was Chandran s/o Sintanasi (DW5). He corroborated the evidence of the defendant that the receipt dated 11 September 1980 (p. 9 of 'A') was signed by the plaintiff who was paid RM7,000 in cash and two cheques totalling RM8,000 by the defendant in his presence. He was also present when the plaintiff signed the letter dated 16 September 1980, (p. 10 of 'A') after it was agreed that he was to take over the purchase of the house from the defendant, and he confirmed that the plaintiff admitted that she had been paid RM50,000 by the defendant for the house and that he had only to pay RM60,000. But under cross-examination this witness made a mistake when he said that it could not be true "if Marimuthu said that he had paid RM10,000 after 11 September 1980" because he was not aware of the payment of RM10,000 by the defendant to the plaintiff through Messrs. James Foong & Co. on 17 September 1980, as evidenced by the receipt shown on p. 11 of 'A'.

On the evidence both documentary and oral adduced in Court, I found as a fact that the plaintiff had been paid a deposit of RM16,500 when the said agreements were signed by her and the defendant on 26 April 1980. The balance of the purchase price amounting to RM93,500 was due to be paid on completion on 26 October 1980 but on 9 May 1980, 11 June 1980 and 17 September 1980 she was paid RM3,500, RM5,000 and RM10,000 respectively by the defendant through M/s. James Foong & Co. (pp. 6, 7 and 11 of 'A'). On 11 September 1980, Chandran took the plaintiff to the defendant's house where the defendant paid her RM7,000 in cash and RM8,000 in two cheques. They then came to an agreement whereby Chandran was to take over the purchase of the plaintiff's house from the defendant and they then went to the office of M/s. James Foong & Co. where the lawyer, Mr. Vijaya Kumar, on their instructions, prepared the letter dated 16 September 1980, for the signature of the plaintiff (p. 10 of 'A'). In consideration of the earlier payments to her of part of the balance of the purchase price, the plaintiff agreed orally to a variation of the said agreements whereby on 11 September 1980, and 16 September 1980, she agreed that, to use her own words, "Chandran requested six months for completion and I agreed", or to be more exact, she agreed after an explanation by the lawyer Mr. Vijaya Kumar that she would be paid the balance sum of RM60,000 after transfer and registration of a charge on her said property and after release of the said sum of RM60,000 by the United Malayan Banking Corporation which had approved a loan for that amount to Chandran.

Y.M. Raja Aziz, the Counsel for the defendant in his submission pointed out that the evidence against the plaintiff was overwhelming. He also pointed out that the plaintiff was only to be paid RM93,500 on 26 October 1980 but was paid RM33,500 before that date as consideration for variation of the agreements. He submitted that there had been no breach of the said agreements by the defendant and that the plaintiff, therefore, had no right to terminate them and was also, therefore, not entitled to the prayers in her said originating summons.

In both his oral and written submissions, Counsel for the plaintiff, Mr. Karpal Singh's main contention was centred on the memorandum of transfer shown on p. 14 of the agreed bundle of documents marked 'A'. He pointed out that Mr. Vijaya Kumar s/o Chornalingam (DW3) had admitted in cross-examination that on 22 September 1980, the balance of the purchase price for the property had not been paid. He then referred to the following words on the first page of the memorandum of transfer (p. 14 of 'A'):

(a) sebagai balasan wang sebanyak RM70,000 yang dengan ini saya mengaku telah terima.

He also pointed out that Mr. Vijaya Kumar had stated that he was told by both parties on that date that is 22 September 1980, RM50,000 had been paid. He therefore contended that the figure "70,000" was wrong and that the Court could not ignore an important statutory requirement that money must be acknowledged to have been paid before a memorandum of transfer on Form 14A was executed. Counsel then referred to *Hew Kee Yin* [1962] 28 MLJ 249 in which case it was held by Suffian J (as he then was) that a memorandum of transfer was not properly attested because it had not been signed in front of the testator. Frankly I could not see nor was Mr. Karpal Singh able to show me the relevance of the ratio of that case to the issues raised in this originating summons. As far as this case was concerned I found on the balance of probabilities that the said memorandum of transfer was signed by the plaintiff and was taken in escrow when it was handed to Mr. Vijaya Kumar on 26 April 1980. It was only completed on 22 September 1980, after Chandran s/o Sintanasi (DW5) had taken over the purchase of the said property from the defendant. In the circumstances I did not agree with Mr. Karpal Singh that the said memorandum of transfer was null and void and should therefore be delivered for cancellation and the title deeds of the plaintiff returned to her. As regards the first prayer in the originating summons, I also did not agree with the contention of Mr. Karpal Singh that there was no evidence to show that there was any variation of the said agreements. In fact the evidence against the plaintiff was more than sufficient to show that in consideration of the earlier payments of part of the balance of the purchase price, the plaintiff agreed to accept Chandran as the purchaser of her property and also to be paid the balance of RM60,000 after registration of a charge on that property followed by the release of that sum by the United Malayan Banking Corporation. Based on the evidence adduced, I found that there had been no breach of the said agreements as alleged by the plaintiff who therefore cannot succeed in her claim. Her originating summons was therefore dismissed with costs.

Also found at [1985] 2 CLJ 273